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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted] 12

UNITED STATES OF AMERICA, *Petitioner*

vs.

APPALACHIAN ELECTRIC POWER COMPANY, *Respondent*

MOTION OF COMMONWEALTH OF VIRGINIA FOR LEAVE TO INTERVENE AS PARTY DEFENDANT

ABRAM P. STAPLES,
Attorney General of Virginia.

Richmond, Virginia.
March, 1940.

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No. 674

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APPALACHIAN ELECTRIC POWER COMPANY, *Respondent*

MOTION OF COMMONWEALTH OF VIRGINIA FOR LEAVE TO INTERVENE AS PARTY DEFENDANT

To the Honorable, The Chief Justice and Associate Justices of said Court:

COMES NOW the Commonwealth of Virginia, by its Attorney General, and moves this Court for leave to intervene as a party defendant or respondent in the above entitled cause, with full right to participate as a party in the hearing and disposition of said cause in this Court, but in subordination to all of the proceedings hereinbefore had in said cause and upon the record as made and filed in this Court.

The grounds upon which this motion is based are:

1. The Commonwealth of Virginia is one of the States of the United States of America and as such pos-

sesses all of the powers of sovereignty over the territory within her domain, including all natural resources situated within her boundaries, except in so far and to the extent that any of her sovereign powers have been surrendered to the United States of America under and by virtue of the Federal Constitution.

2. Virginia desires to emphatically disclaim any hostility toward the Federal Power Commission with respect to its actions in relation to the New River development, or toward the Federal Government in its efforts to institute the regulations here involved. On the other hand, the Commonwealth welcomes and appreciates Federal aid and assistance in appropriate cases. She realizes that the attempted Federal control of the generation of hydroelectric power in New River is intended to be helpful, but she feels that such efforts have had, and will continue to have, results extremely injurious and harmful to the development of her water power and to the best interests of the State. The repeated insistence of the Federal Power Commission upon exercising control over the New River project involved in this case in spite of Virginia's continued protest, Virginia believes has been ill advised and most unfortunate.

3. Virginia has adopted a comprehensive statutory scheme for the conservation, control, regulation, and development of the waters of the State, in accordance with a policy deliberately and advisedly adopted by the State as best adapted to promote the best interests of the State and her people (Michie's 1936 Virginia Code, sections 3581(1)-3581(16)). Among other things, a declared purpose of the State, in enacting and adopting this statutory scheme and policy, is to encourage and pro-

mote the development and utilization of the water power inherent in the waters of the State in order to conserve the coal deposits of the State, to increase her tax resources, to promote her industrial development, to increase the supply of electricity available to the people of the State and reduce the charges therefor, and generally to promote the welfare and prosperity of the State and her people. The Virginia State Corporation Commission is fully empowered to fix rates for electric energy charged by public utilities (Michie's 1936 Virginia Code, sections 4065a, 4066).

4. In execution of the foregoing statutory policy, in the year 1932 Virginia granted a license to the respondent, Appalachian Electric Power Company, for the construction and operation of the hydroelectric development in New River, near Radford, Virginia. New River, Virginia considers a non-navigable stream, and, in so far as it is situated within Virginia, constitutes one of her valuable natural resources by reason of its suitability and adaptability to the development of water power. The construction and operation of said project for which Virginia issued said license will conserve coal deposits, contribute substantially to the tax resources of the State, increase the supply of electric energy available to the people of the State for domestic and industrial use, decrease rates for electric energy, and in these and other ways will substantially contribute to the welfare and prosperity of the State and her people. Under the provisions of the aforesaid license and State statutes, Virginia has the right to acquire such project when, as, and if she deems its acquisition for the best interests of the State and her people.

5. For many years the efforts of the United States, through its agency, the Federal Power Commission, to control the water power developments in Virginia prevented the construction of the New River project. This was due chiefly to the restrictions upon the development of said water power which are contrary to the declared policy of Virginia, but which said Commission sought to impose on said development. The utilization of the water resources of the State have been thereby burdened, retarded, and largely nullified. However, after several unsuccessful attempts to have the validity of the powers attempted to be exercised by the Federal Power Commission tested in the courts, the respondent Virginia licensee began the construction of the project here involved. Soon thereafter, the petitioner brought this suit in the United States District Court for the Western District of Virginia to restrain the said respondent licensee from constructing said project, and to require said licensee to remove any part of said project theretofore constructed under the authority of Virginia's license. The United States District Court for the Western District of Virginia and the Fourth Circuit Court of Appeals have severally held that New River is not a navigable water of the United States, that the construction and operation of the project will not impair the navigable capacity of any navigable waters of the United States, and that the Federal Power Act, nor the Rivers and Harbors Act of March 3, 1899, nor any other Federal statute, purports to condition the development of this water resource of the State upon the consent or regulation of the United States.

6. In its petition for certiorari in this cause, the petitioner has requested this Court to reverse the decree of the Circuit Court of Appeals and to find in substance that New River is a navigable water of the United States, subject to the jurisdiction of the United States and not to the jurisdiction of Virginia, and that (whether said New River be navigable or non-navigable) the power resources of this Virginia stream may not be developed and utilized under the license authority and in accordance with the statutory policy of Virginia, but only under the authority of the Federal Power Commission and the conflicting statutory policy of the United States. Among other things, petitioner asks this Court to hold that this water resource of Virginia may be developed, if at all, only under a Federal license which would vest in the United States, rather than in the State of Virginia, the exercise of all police powers over and in connection with said project and its operation, and in particular would require the respondent Virginia licensee to accept a Federal license providing that the United States may take over the project at the end of the license period for the "net investment" (as determined by said Power Commission and subject to numerous deductions) or its then fair value, whichever is the less. Virginia is advised that her licensee, the respondent, has invested in this development in the belief that the Virginia statutes and license afford to it adequate protection, and that, if said respondent licensee had believed that the project would be controlled by the Federal Power Commission and its burdensome license requirements, the investment would not have been made. Virginia believes that other developments of her water powers have been retarded by doubts as to which regulatory authority would control same.

7. Adjudication of a right in the petitioner to take over said project would nullify and destroy the reserved right of the State of Virginia to acquire the project when and if it should be deemed in the best interests of the State and her people to have the project owned by the State rather than by private enterprise, or, if not so acquired by the State, would subject the State to the risk that the project may be entirely removed from her taxable property as well as from all governmental regulation by the State. The effect of this and other conditions which the petitioner requests this Court to sustain and apply to said development would be to destroy the recapture rights of the State reserved under its license, and to invade the quasi-sovereign rights of the State over and in relation to said project. In addition, the insistence of the petitioner upon the right to prohibit the development of the water resources of the non-navigable waters of Virginia, except with the consent and in accordance with numerous burdensome regulations and restrictions imposed by said petitioner, will, if sustained, effectually nullify and destroy the statutory policy of the State in the conservation, development, and utilization of her water resources, and, apart from the invasion of the sovereign rights of the State, will make the development of her water resources so difficult and burdensome that their development will continue to be seriously curtailed and retarded, greatly to the injury of the welfare and prosperity of the State and her people.

8. Unless this motion is granted and the State of Virginia is permitted to intervene as a party defendant, her jurisdiction to control New River and to regulate the development of the resources of New River, and her

rights under the State license, would be finally adjudicated and destroyed without opportunity to be effectually heard should an adverse decision be rendered. The petition for certiorari was granted on March 4, 1940, and on March 5, the Virginia Legislature adopted unanimously a resolution, a copy of which is annexed hereto and marked Exhibit A, directing her Attorney General to petition this Court on behalf of said State for leave to intervene as a party defendant, and thus participate in the hearing and disposition of this cause.

9. The granting of this motion for leave to intervene is necessary in order to afford the State of Virginia due process of law. Mere participation as *amicus curiae*, without any standing as a party in the proceeding, and without the right to be heard other than by brief, or to make any appropriate motion or take any other appropriate action in the cause necessary to protect the quasi-governmental, as well as property, interests of the State, would be a most inadequate remedy. No remedy short of intervention would afford the State proper opportunity to protect her rights.

10. The property rights of Virginia in the bed of the stream, and the waters flowing over same, are likewise directly involved. The petitioner claims not only the right to exercise general governmental regulatory jurisdiction and police powers over these waters and stream beds for all purposes, but the right to recapture and become the owner of same (Federal Water Power Act, section 14. Appendix to petition for certiorari, pp. 34-6.).

While the question of the ownership of the bed of the stream was not made an issue in the pleadings, nevertheless, the District Court found that "ownership of the bed

is recognized as being in the State" (23 F. Supp., 83, 101).

11. The Federal Water Power Act also makes it unlawful for Virginia herself, or any of her municipalities to develop the water power of the State without securing the required license from the Federal Power Commission (Section 23, Appendix to petition for certiorari, pp. 36-7).

12. While Virginia is unable to point out to the Court any precedent for the granting of this motion, it may be said also that she has been unable to find any similar case in which leave to intervene has been petitioned by a State and denied. In this connection, the attention of the Court is respectfully directed to a bill introduced in the House of Representatives January 8, 1940, by Representative Satterfield of Virginia (H. R. 7737), which, with certain amendments not here material, was reported favorably by the House Judiciary Committee, without objection from the Attorney General of the United States, and was passed unanimously by the House on March 18, 1940. It has not yet been acted on in the Senate. The bill contains these provisions:

> "SEC. 266a. (1) Whenever the validity of the exercise of any power by the United States, or any agency thereof, or any officer or employee thereof, is drawn in question in any court of the United States, and the determination of such question involves any conflict with the exercise by any State of any governmental power of such State, or whenever the exercise of such Federal power would result in any impairment or abridgment of any governmental power asserted by or exercised by such State,

or any agency thereof, or any officer or employee thereof, not already a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the attorney general of such State. In any such case, the court shall permit such State to intervene and become a party for the presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the validity of the exercise of such power. * * *

* * * * *

"(3) As used in this section, the term 'court of the United States' means any district court of the United States, any circuit court of appeals, and the Supreme Court of the United States; * * *."

Obviously, this pending legislation gives Virginia no legal right to intervene in this case, yet its passage by the House, without objection by the Attorney General, is believed worthy of consideration by the Court in determining the reasonableness of the motion, which, of course, is addressed to the Court's discretion.

13. In moving for leave to intervene the State of Virginia expressly consents that the cause may be disposed of by this Court upon the record as made and filed in this Court. The State of Virginia does not tender a separate answer to the complaint of the United States, but requests leave to adopt for the purpose of this suit the answer filed by the respondent, and the amendment thereto, as her answer in this proceeding. Virginia also expressly states that she does not desire to introduce any additional testimony or other evidence in this case. Consequently, the granting of such intervention will not disturb the state of the record or of the proceedings.

14. WHEREFORE, the Commonwealth of Virginia prays that leave to intervene as a party defendant in the above entitled cause in this Court be granted under the terms and conditions stated in the foregoing motion.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General of Virginia.

Richmond, Virginia.
March, 1940.

EXHIBIT A.

SENATE JOINT RESOLUTION NO. 33

Whereas, the Federal Power Commission, a regulatory agency of the United States, has asserted in the Federal Courts, in a suit instituted by the United States against the Appalachian Electric Power Company, that it is possessed of plenary jurisdiction and powers to regulate the construction and operation of, and ultimately to recapture the ownership of, an electric water power plant of said company on New River, near Radford, Virginia; and,

Whereas, said plant was constructed pursuant to authority conferred on said Company by a license issued to it by the Virginia State Corporation Commission in conformity with Virginia statutes relating to and regulating the construction and operation of such power plants; and,

Whereas, the conditions sought to be imposed by the Federal Power Commission on Virginia's said licensee are so burdensome that, if generally applied to Virginia waters, they will completely annul the legislative policy of this Commonwealth to encourage the development of her water powers; and,

Whereas, the United States District Court for the Western District of Virginia and the United States Circuit Court of Appeals for the Fourth Circuit (by a two to one decision) have both sustained the jurisdiction and power of Virginia to regulate said plant on New River, but the United States has decided to carry said case to the United States Supreme Court;

Now, therefore, Be it resolved by the Senate of Virginia (the House of Delegates concurring) as follows:

1. That the Commonwealth of Virginia considers the development of her water powers a matter of State concern only and one within her exclusive jurisdiction to regulate.

2. That the regulation by Virginia of her water powers, free from burdensome restrictions having no substantial relation to navigation in interstate commerce, is of vital importance to the interests of the Commonwealth.

3. That the General Assembly of Virginia is of opinion that the jurisdiction to exercise the said powers asserted by the United States over Virginia's streams was not conferred on the United States by the United States Constitution and can be conferred only by an act of the General Assembly of Virginia ceding such jurisdiction to the United States.

4. That the Commonwealth of Virginia has not only not ceded such jurisdiction or consented to the exercise by the United States of such jurisdiction, but has protested against same before the Federal Power Commission from the beginning, and also in the courts at all times, and does now still further protest against same.

5. That the development of Virginia's water powers is not a matter of national concern, but a problem of the State which this Commonwealth is fully competent and able to administer and regulate and is properly administering and regulating through her State Corporation Commission, and no facts exist which provide any basis, reason or necessity for Federal intervention in relation to same, except to the extent such development may affect interstate navigation.

6. That the Attorney General of Virginia, Honorable Abram P. Staples, be, and he hereby is, requested to file a petition for leave to intervene in said suit in the Supreme Court of the United States as a party defendant, and, if such leave be not granted, then to take all possible action in said suit, as *amicus curiae*, to sustain the exclusive jurisdiction of the Commonwealth of Virginia over her streams in all matters not substantially related to navigation in interstate commerce.